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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.9201 OF 2005

The Commissioner
Solapur Municipal Corporation ... Petitioner

V/s.

1. Smt.Lata Dashrath Dhere & Ors. ... Respondents

Mr.Nitin Jamdar for Petitioner
Mrs.Lata Dhere, Respondent No.1, present in person

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **JULY 16, 2007**

JUDGMENT:

. By this petition, the petitioner challenges the order dated 4.8.2005 of the Labour court passed under section 33-C(2) of the Industrial Disputes Act. The claim of Respondent No.1 has been allowed partly.

2. The undisputed facts in the present case are as follows:

Respondent No.1 was employed as a Pharmacist with the Leprosy Hospital run by the Solapur Municipal Corporation from 23.11.1986 on daily wages. She continued working on a daily wage of Rs.19/- upto 14.8.1987 after which she was extended the regular payscale for the post of Pharmacist. Respondent No.1 had by then secured a Diploma in Pharmacy. She worked

not only at the Leprosy hospital but also at other hospitals as directed by the Petitioner. An order was issued by the Petitioner on 11.12.1996 directing that all employees who had obtained a Diploma in Pharmacy should be accorded the payscales recommended by the IV Pay Commission w.e.f. 1.1.1986. The arrears of pay were also directed to be paid. According to Respondent No.1, she had demanded the payscales applicable to Pharmacists under the IV Pay Commission recommendations and had also requested the petitioner to pay arrears. The petitioner did not accede to her request. Respondent No.1 resigned from service on 1.6.2000. At the time of submitting her resignation, she once again applied for arrears of payscales in accordance with the directions of the petitioner to extend the IV Pay Commission scales to the Pharmacists. Since the petitioner did not respond favourably to her demand, Respondent No.1 filed an application under section 33-C(2) of the Industrial Disputes Act being application (IDA) No.15 of 2001. She also claimed her leave wages besides the arrears and demanded an amount of Rs.1,68,223/- alongwith 18% interest.

3. The Petitioner opposed the application contending that Respondent No.1 was not entitled to any amount since there was no separate grant available for employees of the Leprosy hospital. According to the

Petitioner, this hospital is a Public Trust registered under the Bombay Public Trusts Act and the Commissioner of the Corporation is one of the Trustees. The State of Maharashtra disburses about Rs.480/- per patient per month to the Hospital. Admittedly, the hospital employs a number of employees including a Medical officer, Pharmacists, a Dresser, Lab Technicians, a Manager and Lower Grade Clerks. The petitioner contended that they were unable to afford the payscales demanded by Respondent No.1 and, therefore, the application should be dismissed.

4. Evidence of both the parties was led before the Labour Court. The Labour Court upheld the contention of Respondent No.1 and allowed the claim of Respondent No.1 to a limited extent. The Labour Court directed the petitioner to pay Respondent No.1 arrears from 1.8.1993 to 1.6.2000. The Petitioner was directed to deposit the amount within a month from the date of the order i.e., 4.8.2005 failing which the amount would carry interest @ 9% p.a. The Labour Court held that the Respondent No.1 had proved her case that she was entitled to be extended the payscales recommended by the IV Pay Commission. The witness examined on behalf of the petitioner admitted that the Petitioner had taken over the control of management of the hospital w.e.f. 5.6.1985. The witness also admitted that the IV Pay Commission

payscales were not extended to Respondent No.1 despite the orders issued by the Petitioner. Aggrieved by the decision of the Labour Court, the petitioner has approached this Court under Article 227 of the Constitution of India.

5. The main contention raised by Mr.Jamdar, appearing for the Petitioner, is that the Leprosy hospital could not be considered an Industry and therefore, the application filed under section 33-C(2) of the I.D. Act should have been dismissed. He submits that the Leprosy hospital is a charitable organisation undoubtedly run by the Municipal Corporation. However, according to him, the number of patients in the hospital has reduced and the amount received from the Government to run the same is inadequate for meeting the expenses of the hospital. He also submits that the hospital being registered under the Bombay Public Trusts Act, it could not be considered an industry. The learned Advocate places reliance on the judgment of the Supreme Court in the case of *State of U.P. v/s. Jai Bir Singh,* **(2005) 5 SCC 1.** He urges that although in that case, the Supreme Court had referred the judgment in *Bangalore Water Supply & Sewerage board v/s. A. Rajappa* **(1978) 2 SCC 213** to a larger bench for reconsideration, the observations of the Supreme Court in *State of U.P. v/s. Jai Bir Singh (supra)* are sufficient for this Court to

set aside the impugned judgment. He submits that although the judgment of the Supreme Court in *Bangalore Water Supply (supra)* has not been expressly overruled, the observations in *Jai Bir Singh's case (supra)* have persuasive value and are enough to dismiss the application filed by Respondent No.1.

6. On merits, the learned Counsel submits candidly that the Petitioner cannot pay the wages as demanded since the hospital has no money. He concedes that the IV Pay Commission recommendations have been made applicable to the Solapur Municipal Corporation and other employees are being paid accordingly.

7. Respondent No.1 who appears in person submits that the case as to whether the hospital is an industry or not was never pleaded by the petitioner and, therefore, this issue cannot be raised in the writ petition. She further submits that after she resigned from service, the hospital was paying salary to another co-worker who was employed as a Lab Technician by drawing the salary grant from the Municipal Corporation. She submits that despite several efforts made by the her, the Petitioner did not accede to her demand for wages which were legally due and payable to her.

8. Admittedly, the Petitioner has not raised the

issue as to whether the Leprosy hospital in which Respondent No.1 was working is an industry or not. The only contention raised was that the hospital was registered under the Bombay Public Trusts Act and that it was not getting grants regularly which made it impossible for the hospital to concede the demands of Respondent No.1. The issue as to whether an establishment is an industry or not is a mixed question of law and fact. If the employer does not plead at the first instance that the establishment is not an industry it would not be open for the employer to contend when a writ petition is filed that the establishment run by it is not an industry. The submission of the learned advocate for the petitioner is that such a question regarding the jurisdiction can be raised even at the stage when the writ petition comes for hearing.

9. He relies on the judgment of a learned Single Judge of this Court in the case of Maharashtra Industrial Development Corporation v/s. Member, Industrial Court, Civil Lines, Nagpur & Ors., 2006(3) ALL MR 552 in support of his submission that an issue regarding jurisdiction could be raised even at the stage of the writ petition. In this case, the workman had approached the Labour Court complaining of an unfair labour practice under Item 1 of Schedule IV. The Labour Court dismissed the complaint by concluding that there

was no relationship of employer-employee between the workman and the MIDC. Aggrieved by this order, the workman preferred a revision application to the Industrial Court. The Industrial Court held that the MIDC as the principal employer was liable to reinstate the workman with continuity of service and backwages. It was contended in that case on behalf of the MIDC that in view of several judgments of the Supreme Court, the moment the relationship of employer-employee is disputed by the employer, a complaint under the MRTU & PULP Act is not maintainable as the jurisdiction of the Labour Court/Industrial Court is ousted. It is in these circumstances that this Court held that when the existence of the jurisdiction of the Labour Court to investigate the complaint is in question, it could be raised even at the stage of the writ petition. It was because the MIDC had in fact raised an issue regarding the maintainability of the complaint as there was no employer-employee relationship, this Court was of the view that it could be raised even at the stage of a writ petition. This judgement does not help the petitioner in any manner. The question as to whether the hospital is an industry or not is a mixed question of fact and law and unless there are pleadings to the effect that it is not an industry, the petitioner’s contention cannot be accepted. In the MIDC case, although the question of jurisdiction was raised for the first time before this

Court, there were pleadings to the effect that the workman was not employed by MIDC but by a contractor. It was only because of the judgments of the Supreme Court holding that when the employer-employee relationship is in dispute, the Labour Court or the Industrial Court could not proceed with the complaint under MRTU & PULP Act.

10. Whether an establishment is an industry or not would necessarily have to be established as a matter of fact. If such a question is raised in the pleadings by the employer, the Labour Court would necessarily have to frame an issue in that regard. Parties would then be put to notice that they would have to lead evidence on the issue. After the evidence is led, it would be for the Labour Court or the Industrial Court/Tribunal to assess the evidence and decide whether the establishment is an industry. Thus the factual matrix must show that the establishment does not fall within the purview of the term "industry" as defined under section 2(j) of the Industrial Disputes Act. In the present case, when there is no pleading nor evidence led as to whether the hospital is an industry it would not be proper to hold that the hospital was not an industry merely because it was a charitable organisation.

11. Furthermore, the submission of the learned advocate for the petitioner that in *Jai Bir Singh's case (supra)*, the Supreme Court has held that a hospital is not an industry cannot be accepted. The learned advocate submits that the decision in the case of *Bangalore Water Supply (supra)* operates in a different field from that of the decision of the Supreme Court in the case of *Safdarjung Hospital v/s. Kuldeep Singh Sethi,* **(1970) 1 SCC 735**. He submits that in *Safdarjung Hospital's case (supra)* by a unanimous decision of six learned Judges of the Supreme Court it was held that a hospital would not be considered an industry as defined in section 2(j) of the Industrial Disputes Act. In the case of *Jai Bir Singh (supra)*, although the apex Court was inclined to agree with the observations made in the *Safdarjung Hospital's* case and in the case of *State of Bombay v/s. Hospital Mazdoor Sabha,* **AIR 1960 SC 610,** all that the Supreme Court has done in *Jai Bir Singh's* case is that the Hon'ble the Chief Justice of India was requested to constitute a larger Bench for reconsideration of the judgment in the case of *Bangalore Water Supply (supra)*. Thus till such a larger Bench is constituted for reconsideration of the judgment in the case of *Bangalore Water Supply*, the latter judgement holds the field. In any event, in the present case, I need not consider as to whether the hospital in which the respondent was working is an industry or not since

no issue in that regard was raised by the Petitioner.

12. As stated earlier, on merits, the case of the petitioner is unsustainable. Admittedly, Respondent No.1 was working as a Pharmacist and was entitled to wages as recommended by the Pay Commission. In fact a circular dated 4.12.1996, produced on record, issued by the petitioner very clearly directs that the wages recommended by the IV Pay Commission for Pharmacists are liable to be paid. Arrears of wages were also directed to be paid. In these circumstances, there is no merit in the petition.

13. Petition dismissed. The Petitioner shall pay the dues to the Respondent No.1 within eight weeks from today. No order as to costs.